



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 25, 1993

Mr. Tracy A. Pounders
Assistant City Attorney
City of Dallas
City Hall
Dallas, Texas 75201

OR93-359

Dear Mr. Pounders:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19462.

The Dallas Police Department (the "department") received an open records request for documents pertaining to the department's investigation of three unrelated allegations of sexual assault and one allegation of sexual harassment made against Dallas police officers. You state that the city "shall try to make as much of the information available to the requestor as is possible." You contend, however, that certain documents you have submitted to this office come under the protection of sections 3(a)(1), 3(a)(3), 3(a)(7), and 3(a)(11) of the Open Records Act.

Section 3(a)(3) of the Open Records Act, known as the litigation exception, excepts from required public disclosure:

information relating to litigation of a civil or criminal nature and settlement negotiations, to which the state or a political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

You originally contended that section 3(a)(3) excepts this material from required disclosure because

[m]uch of the requested information relates in one way or another to pending criminal and civil litigation. The City's as well as the State of Texas' interest could be damaged by release of the information.

Because it was not clear from your letter to us exactly which of the requested documents related to pending litigation, a member of our staff contacted you for clarification. You then stated that you were actually concerned about withholding only one¹ of the investigative files pursuant to section 3(a)(3) because the victim had publicly stated that she intended to file suit against the city because of the assault.

To secure the protection of section 3(a)(3), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision Nos. 588 (1991); 452 (1986). In this instance you have provided this office with no evidence that the information at issue pertains to pending litigation. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. Open Records Decision Nos. 437 (1986); 331, 328 (1982).

The mere threat of litigation, without more, does not trigger section 3(a)(3). Open Records Decision No. 331. You have not provided this office with any concrete evidence that the city reasonably expects to become a party to a civil lawsuit in connection with the assault. Consequently you may not withhold any of this information pursuant to section 3(a)(3).

You also contend that section 3(a)(11) of the act protects "a good deal" of the requested information. You have not, however, identified any particular documents that come under the protection of this section. The Open Records Act places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental body fails to claim an exception or demonstrate how it applies to particular information, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinions JM-672 (1987); H-436. Although you sent copies of the requested information, you did not indicate which specific portions of the documents come under the protection of section 3(a)(11). Consequently, this office cannot consider your section 3(a)(11) claims.

¹We therefore deem as waived any section 3(a)(3) claim with regard to the other three files at issue.

We next address your section 3(a)(7) claims. Section 3(a)(7) of the act protects, *inter alia*, information coming within the attorney-client privilege. *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.*

You contend that "[m]uch of the information requested includes correspondence from a client to an attorney (either the City of Dallas or the State of Texas) outlining facts pertaining to litigation, and attorney's reports concerning the merits of the litigation." Here again, however, you have failed to identify any specific records that you believe to come under the protection of this exception. After a review of the records at issue, this office was able to identify only one type of record, entitled "Prosecution Report," that might have been prepared by an attorney. These reports, however, contain only a factual description of the offense and lists of witnesses and the substance of their proposed testimony. We do not believe that this information constitutes a privileged communication for purposes of section 3(a)(7). Accordingly, because you have not met your burden under section 3(a)(7) with regard to these or other documents contained in the requested files, the department may not withhold any information pursuant to this section.

Finally, we must determine whether any of the information at issue comes under the protection of section 3(a)(1), which protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." We note that several of the requested files contain references to the results of polygraph examinations. Section 19A of article 4413(29cc), V.T.C.S., which governs the release of polygraph examinations, reads in pertinent part:

....

(c) A licensed polygraph examiner, licensed trainee, or employee of a licensed polygraph examiner may disclose *information acquired from a polygraph examination* to:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person . . . or governmental agency that requested the examination;

(3) members or their agents of governmental agencies such as federal, state, county, or municipal agencies that license, supervise, or control the activities of polygraph examiners;

(4) other polygraph examiners in private consultation, all of whom will adhere to this section; or

(5) others as may be required by due process of law.

(d) A person for whom a polygraph examination is conducted or an employee of the person may disclose information acquired from the examination to a person described by Subdivisions (1) through (5) of Subsection (c) of this section.

(e) *The board or any other governmental agency that acquires information from a polygraph examination under Subdivision (3) of Subsection (c) of this section shall keep the information confidential.* [Emphasis added.]

Consequently, the department is barred by statute from releasing the results of any of the polygraph examinations contained in these files to the requestor.² See also Open Records Decision No. 430 (1985).

Section 3(a)(1) also protects information that implicates individuals' common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. Clearly, information pertaining to an incident of sexual assault raises an issue of common law privacy. Open Records Decision No. 339 (1982).

Because you requested an open records decision from this office pursuant to section 7(c) of the Open Records Act, this office attempted to notify the victims of the assaults and sexual harassment for the purpose of establishing whether they objected, in this particular instance, to the release of their respective files to the requestor. Although this office did not obtain authorizations to the release the respective records of three of the individuals, one of the victims has informed us that she authorizes the release of all the department's records contained in her file that directly relate to the assault.

²However, the department may not withhold the mere fact that an individual has taken or was scheduled to take a polygraph examination.

(Authorization enclosed.) Accordingly, this office deems any privacy interest that this individual may have had in those records as waived with regard to the pending open records request.

We note, however, that this particular file also contains records that do not directly relate to the assault and that implicate the victim's privacy interests. The department must withhold from this file all criminal history information pertaining to the victim. See *United States Dept. of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749 (1989) (criminal history of private citizen protected by privacy). Furthermore, because the records of a separate offense investigated by the Abilene Police Department do not come within the ambit of the open records request, the department may also withhold these records. Finally, we note that this file contains information that implicates the privacy interests of third parties; we have marked the information that the department must withhold to protect those persons' privacy.

With regard to the other two investigative files involving sexual assaults, the requestor of the records has informed this office that the two victims appeared on a nationally syndicated talk show and spoke candidly about their respective assaults. After reviewing a copy of the telecast, this office concludes that those two individuals have waived any privacy interest they may have had in the information that contains detailed descriptions of the assaults.³ The department must withhold, however, all criminal history information in these files and the true name of the victim who chose to use a pseudonym pursuant to section 57.02(f) of the Code of Criminal Procedure. Additionally, because the requestor has informed this office that she does not wish to obtain copies of certain photographs taken inside and outside of a nightclub which the department obtained in connection with one the investigations, these photographs need not be released. On the other hand, in light of the fact that these two victims appeared on national television, the department must release other photographs that we have marked as constituting public information.

Finally, this office was unable to contact the victim of the sexual harassment. In order to protect the privacy interests of this individual, this office believes that the department need withhold only the victim's name and other identifying information. Compare *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) (content of statements would tend to reveal victim's identity). The department must also withhold all criminal history information contained in this file. All remaining information contained in this file must be released, except as discussed above.

³While we note that one of the files also contains an offense report wherein the victim was involved in a domestic disturbance, this information is not protected by common-law privacy. Open Records Decision No. 611 (1992).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Rick Gilpin
Assistant Attorney General
Opinion Committee

RG/RWP/jmn

Ref.: ID# 19462
ID# 19471
ID# 19668
ID# 19812
ID# 19819
ID# 20249
ID# 20348

Enclosures: Submitted documents
Consent to release

cc: Ms. Muriel Pearson
ABC News
157 Columbus Ave.
New York, NY 10023
(w/o enclosures)